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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN AND CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898
Counsel for the Petitioner

Of Counsel
STANLEY M. BROWN
DAVID L. NIXON
LESLIE C. NIXON
BROWN AND NIXON
Eighty Merrimack Street
Manchester, New Hampshire 03101
(603) 669-8080

QUESTIONS PRESENTED

1. Whether the court of appeals, which reversed an order granting a motion for a new trial, erred by following the "modern trend" which, by allowing greatly expanded appellate scrutiny, substantially diminishes the discretion traditionally accorded the trial court as to new trial orders.

2. Whether the court of appeals' decision reversing an order granting a motion for a new trial has so far departed from the deference typically accorded trial judges' decisions on these motions as to require an exercise of this Court's supervisory powers.

3. Whether the shift to greater appellate power to review new trial orders, which diminishes the traditional role of the trial judge in acting as an historic safeguard of the right to trial by jury, comports with the requirement of the Seventh Amendment that "the right of trial by jury shall be preserved."

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The petitioners, Marion V. Coffran and Charles W. Coffran, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on June 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 683 F.2d 5, and is set forth in Appendix A, *infra*, pp. 1a-12a. The opinion of the United States District Court for the District of New Hampshire is not reported; it is set forth in Appendix C, *infra*, pp. 15a-24a.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit, which was entered on June 29, 1982, is set forth in Appendix D, *infra*, p. 25a. A timely petition for rehearing was denied by an order entered on July 26, 1982. The order and accompanying memorandum appear in Appendix E, *infra*, pp. 27a-29a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Const. Amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

STATEMENT

Petitioners, Marion V. Coffran and Charles W. Coffran, are citizens of the State of Vermont and residents of Windsor, Vermont. Respondent, Hitchcock Clinic, Inc., is a New Hampshire corporation with its principal place of business in Hanover, New Hampshire.

Petitioner, Marion Coffran, had two hernia operations at Mary Hitchcock Memorial Hospital in 1970, on April 15 and June 5. The operations were performed by doctors who were members of Hitchcock Clinic, Inc., respondent. For both the April and June operations, Mrs. Coffran was administered the anesthetic "halothane."

On June 18, 1970, Mrs. Coffran was readmitted to the hospital and diagnosed as having halothane-induced hepatitis. This diagnosis was confirmed by respondent's own doctors, including the anesthesiologist who had prescribed the halothane, and the gastroenterologist who has cared for her since 1970. Mrs. Coffran has permanent injuries, including severe and permanently-disabling brain damage, as a result of the hepatitis.

In 1975, Mrs. Coffran, with her husband Charles W. Coffran as co-plaintiff, brought an action against respondent and Mary Hitchcock Memorial Hospital in the United States District Court for the District of New Hampshire. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332(a).

Petitioners contended that Mrs. Coffran's hepatitis was caused by the negligent administration of the anesthetic "halothane." More specifically, petitioners alleged, in part, that respondent's doctors failed to recognize facts, and failed to perform preoperative tests, which would have revealed certain "markers" of sensitivity which contraindicate the administration of halothane.

In November 1978, a jury trial was held before Judge Herbert N. Maletz of the United States Customs Court, sitting by designation. The jury returned verdicts for both defendants, after submitting four written questions indicating confusion as to the issues involved. Petitioners filed motions for judgment

notwithstanding the verdict and for a new trial. Petitioners asserted two grounds in support of their new trial motion: that the jury verdict was against the great weight of the evidence, and that the jury, as its four questions revealed, had been seriously confused so that it would be a miscarriage of justice to allow its verdict to stand.

On February 13, 1979, Judge Maletz filed an order and accompanying memorandum denying the motions for j.n.o.v., denying the new trial motion as to Mary Hitchcock Memorial Hospital, and granting the motion for a new trial as to respondent, Hitchcock Clinic, Inc. Judge Maletz found that "the jury reached a seriously erroneous result—a result which was contrary to the clear weight of the evidence and which, if allowed to stand, would constitute a patent and grave miscarriage of justice." (App. C at 23a-24a.) Judge Maletz did not address the issue of jury confusion.

Judge Maletz concluded that the clear weight of the evidence established: "either that [Mrs. Coffran's] hepatitis was caused by the halothane anesthesia which was readministered to her on June 5, 1970 (after a prior administration on April 15, 1970) or that the hepatitis preexisted the readministration of halothane on June 5, 1970 when it was aggravated by such administration." (App. C at 17a-18a.) The judge found that, under either theory, the overwhelming weight of the evidence established that an anesthesiologist employed by respondent "was negligent, if not grossly negligent, in readministering halothane to Mrs. Coffran on June 5, 1970 without giving her standard and routine pre-operative blood and laboratory tests (save for an urinalysis) prior to such readministration of halothane." (App. C at 18a.) Moreover, "[t]he clear weight of the evidence also established that in the exercise of reasonable medical care such standard tests should have included at the least a complete blood count."[1] (App. C at 18a.)

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[1] Judge Maletz paid particular attention to the failure to perform an eosinophil test. Noting that an eosinophil count of over 7% (Mrs. Coffran's count recorded in July, 1970) was abnormal, he determined, in essence, that the clear weight of the evidence established that the failure to perform this test was negligent, and that this negligence was responsible for Mrs. Coffran's injuries.

In November 1979, a second jury trial was held before Judge Loughlin, United States District Judge for the District of New Hampshire. The second trial resulted in jury verdicts for petitioners in the amount of $513,000.[2] After the district court denied motions for j.n.o.v. and, in the alternative, for a new trial, respondent appealed to the United States Court of Appeals for the First Circuit.

Respondent's sole ground for appeal was that Judge Maletz had erred in granting petitioners' motion for a new trial, after the 1978 verdicts in favor of respondent. The First Circuit agreed, vacated both the order granting a new trial and the judgments entered in the second trial, and remanded with directions that judgment be entered on the verdict in favor of the respondent.

The court of appeals stated that it could only reverse a trial judge's ruling on a motion for a new trial if it found an abuse of discretion. The court noted, however, that "the modern trend when reviewing the granting of new trials on the ground that the verdict is contrary to the great weight of the evidence is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F.2d at 6; App. A at 2a-3a.) After its own "careful review of the record" (683 F.2d at 7; App. A at 3a), the court of appeals concluded that "the district court erred in granting [petitioners'] motion for a new trial." (683 F.2d at 7; App. A at 3a.) The court acknowledged that the trial judge had found that the jury verdict for respondent was contrary to the clear weight of the evidence, but concluded that, in its opinion, the record did not support that finding.

> Rather, while it was established that Mrs. Coffran's care was deficient in certain respects, the medical evidence was conflicting as to whether the hepatitis she contracted was causally related to those deficiencies. On the evidence presented, we do not see how a defendant's verdict could be considered as contrary to the clear weight of the evidence. Rather it reflected a jury's resolution of what was factually a very close and difficult case.

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[2] With interest and costs, the verdicts now approximate $1,000,000.

(683 F.2d at 7; App. A at 3a.)

The court of appeals discussed the two factors emphasized by the district court: "the Clinic's failure to perform an 'eosinophil count' before the June operation, and the possibility that Mrs. Coffran had contracted viral hepatitis before the June operation which was aggravated by readministration of halothane." (683 F.2d at 8; App. A at 6a.)[3] With respect to the failure to perform an eosinophil test in June, the court claimed that three distinct questions were presented: (1) does Mrs. Coffran suffer from halothane hepatitis, (2) did the omission of this test constitute a failure to provide reasonable medical care, and (3) if the test had been done, would it have shown halothane sensitivity.[4]

On the third issue—"whether the clear weight of the evidence was that had the test been done, it would have shown an abnormal reading which, in turn, would have triggered an examination leading to the use of another anesthetic"—the court of appeals "disagree[d] with the district court." (683 F.2d at 10; App. A at 9a.) The court stated that acceptance of this argument required proof of four propositions:

> (1) that an abnormally high eosinophil reading may reflect sensitivity to a variety of different drugs, as well as other conditions; (2) that Mrs. Coffran was sensitized to halothane; (3) that therefore if the test had been done, it would have shown an abnormal reading; and (4) that this abnormal reading, while

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[3] The court concluded that the latter theory could not have justified a new trial since the "aggravation" theory had not been presented to the jury.

[4] On the first issue, the court determined that it would accept, "for present purposes," that the district judge did not exceed his discretion in concluding that it would be against the clear weight of the evidence to find that Mrs. Coffran's hepatitis was not caused by halothane. On the second question, the court found "that the district court was on firm ground in concluding that the failure to give Mrs. Coffran this test was so plainly negligent that a contrary jury finding would be against the clear weight of the evidence." (683 F.2d at 10; App. A at 9a.)

> not in itself specifically pointing to halothane as the cause, would have been reason to postpone the operation, make further tests, and ultimately decide on a different anesthetic.

(683 F.2d at 10; App. A at 9a.)[5]

The court's "difficulty" centered on the third proposition, i.e, "did the clear weight of the evidence demonstrate that, in her case, the test would have been abnormal?" (683 F.2d at 10; App. A at 10a.) The court concluded: "[w]e do not think that plaintiffs carried their burden so convincingly on this point as to justify the grant of a new trial." (683 F.2d at 11; App. A at 10a.)

After examining the expert testimony on the probability that Mrs. Coffran would have exhibited an abnormal eosinphil count, the court determined that, given the testimony of respondent's expert (to which it accorded great deference based, in part, on the expert's "exceptional credentials"), it did not believe that the jury could be characterized as seriously mistaken if it chose to believe that the failure to perform the eosinophil test was not a cause of Mrs. Coffran's injuries. The court concluded:

> Given the credible expert testimony[6] that the Clinic's failure to perform an eosinophil test in June was not causally related to Mrs. Coffran's hepatitis, we must conclude that the district court abused its dis-

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[5] The court found that "[t]he first proposition was undisputed, and, while the fourth is more speculative, we shall accept it for present purposes." (683 F.2d at 10; App. A at 9a.) As to the second proposition, the court decided to "proceed on the supposition that the weight of the evidence demonstrated that her hepatitis was caused by the halothane, and that she was sensitized to it prior to June." (683 F.2d at 10; App. A at 9a-10a.)

[6] As he was entitled to do in ruling on a motion for a new trial, Judge Maletz had "evaluat[ed] . . . the quality of the evidence presented," and found that the probative weight of the testimony of respondent's expert was "lessened by a number of considerations." (App. C at 22a.) The testimony of respondent's expert had not, therefore, convinced Judge Maletz (who heard the witnesses and was in the best position to evaluate their testimony) that the jury's verdict was not seriously erroneous.

> cretion in granting a new trial on the ground that the verdict in favor of the Clinic was against the weight of the evidence. We find no basis in the record on which it could logically be concluded that the clear weight of the evidence supported an inference that had an eosinophil test been given, Mrs. Coffran's alleged susceptibility to halothane hepatitis would have been revealed.

(683 F.2d at 11; App. A at 11a-12a.)

Subsequently, petitioners filed a petition for rehearing with the First Circuit. On July 26, 1982, the court of appeals issued a memorandum and order denying the petition.[7] In its memorandum order, the court reaffirmed the substance of its earlier holding: "Plaintiffs, however, do not show that it would be reasonable to conclude that the jury would have been clearly erroneous in finding that causation was not established." (App. E at 28a.)

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court.

A. Without this Court's guidance or approval, some federal courts of appeals have greatly expanded the scope of appellate review of rulings on new trial motions.

This Court has consistently fostered the principle that "[t]he authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (emphasis added). And, this Court has long adhered to the traditional rule that the courts of appeals should rarely, if ever, interfere with trial judges' rulings on new trial motions. *See, e.g., United States v. Johnson*, 327 U.S. 106; *Fairmount Glass Works v. Cub Fork Coal Co*, 287 U.S. 474.

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[7] In its memorandum, the court reiterated its earlier finding that the "aggravation" theory had not been presented to the jury. In any event, the court stated: "the great weight of the evidence does not demonstrate that defendant was negligent in failing to diagnose the hepatitis before the June 5 operation." (App. E. at 27a.)

Despite this Court's consistent pronouncements on these issues, the proper standard for appellate review of a trial judge's ruling on a motion for a new trial has been the subject of debate in the courts of appeals.[8] And, in recent years, some of these courts have brought about a considerably expanded scope of appellate review.

In the instant case, the First Circuit did state that an appellate court should only reverse an order granting a motion for a new trial when the trial judge has committed an abuse of discretion. The court emphasized, however, that it subscribed to the "modern trend" which "is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F2d at 6; App. A at 3a.) The court admittedly exercised a closer degree of scrutiny and supervision than traditional doctrine permitted. After independently weighing the evidence, the court of appeals made its own evaluation of the credibility of witnesses. Ignoring the principle that appellate courts should be especially chary of overturning rulings on new trial motions in complex cases, the court of appeals compartmentalized the proof and based its holding on the insufficiency of the evidence on one element of petitioners' case.[9]

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[8] One leading treatise asserts that "[t]here are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2818 at 118 (1973).

[9] In addition, the First Circuit ordered reinstatement of the first jury verdict without remanding to afford the trial judge the initial opportunity to rule on a new trial issue that had been left unresolved, i.e., whether manifest jury confusion warranted a new trial. When such questions, which are appropriately addressed, in the first instance, to the trial judge's discretion, have been left unresolved, a remand is the appropriate response. The First Circuit, after independently reviewing the evidence, did conclude: "we cannot say that the record reflects such clear evidence of jury confusion as would justify either an affirmance of the grant of a new trial or a remand for clarification from the district court." (App. E at 28a-29a.) A court of appeals is, however, simply in no position to make this sort of

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The decision below illustrates the fundamental flaw in the "modern trend" towards more expansive appellate review of orders granting new trials because the verdict was against the clear weight of the evidence. The First Circuit's inquiry, i.e., engaging in a detailed evaluation of the proof and determining the weight of the credible evidence supporting each aspect of a long and complex case, necessarily impinges on the traditional *discretion* of the trial judge to grant a motion for a new trial when he—in the exercise of his professional *judgment*—determines that the case should be reconsidered by a second jury.[10]

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assessment. "Like demeanor, confusion is more readily discerned by one in a position to observe the trial. [The appellate court's] failure to find confusion would not be dispositive." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C. Cir. 1981). When a nonfrivolous new trial issue invoking the exercise of the trial judge's discretion is presented, the appropriate course is to remand. *See Iacurci v. Lummus Co.*, 387 U.S. 86; *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317. The First Circuit's determination to decide this question without a remand is another indication of an overly expansive exercise of appellate review.

[10] As mentioned, the First Circuit rejected Judge Maletz's reliance on the "aggravation" theory. Although all the participants—Judge Maletz and both parties—assumed that the issue had been presented to the jury, the court of appeals concluded otherwise. Moreover, the court of appeals, in denying the Coffrans' petition for rehearing, stated: "Even if the jury had been instructed to consider this possibility, however, the great weight of the evidence does not demonstrate that defendant was negligent in failing to diagnose the hepatitis before the June 5 operation." (App. E. at 27a.) Perhaps not surprisingly, given the "modern trend" towards an expanded scope of appellate review, this passage clearly misstates the appellate role. The question is not whether the *court of appeals* believes that the great weight of the evidence supports a particular theory. The appellate role is limited to determining whether the *trial judge's* conclusion about the weight of the evidence was a clear abuse of discretion.

Traditionally, a trial judge's ruling on a motion for a new trial based on the claim that the verdict was against the weight of the evidence *was not reviewable by an appellate court.* As Judge Learned Hand stated: "[T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). In fact, this rule was "too well established to justify discussion." *Id.* In so holding, Judge Hand cited this Court's decisions in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 and *United States v. Johnson*, 327 U.S. 106. In *Fairmount*, this Court said that it would not itself review the "granting or denying a motion for a new trial for error of fact . . . ," and added: "The rule precludes likewise a review of such action by a circuit court of appeals." 287 U.S. at 481.[11]

Recently, however, some federal courts of appeals have greatly enlarged the scope of their review of rulings on new trial motions. Using a variety of theories, these courts have substan-

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[11] In *Miller v. Maryland Casualty Co.*, 40 F.2d 463, 465 (2d Cir. 1930), Judge Learned Hand, in commenting on appellate review of rulings on new trial motions based on the inadequacy of the damages awarded, questioned the desirability of reviewing such rulings for abuse of discretion:

> The trial judge decides what verdict is within the bounds of reasonable inference from the evidence. That is a question which we can consider as well as he, and which we do upon his direction of a verdict. But by hypothesis we are not to be allowed to do that; we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements.

tially eroded the deference traditionally accorded trial courts' decisions on these motions. For example, in *Lind v. Schenley Industries Inc.*, 278 F.2d 79 (3d Cir. 1960), *cert. denied*, 364 U.S. 835, which was relied upon in the decision below, the Third Circuit concluded that the traditional view that "the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial," *id.* at 90, did not apply when a new trial had been granted on the ground that the jury verdict was against the weight of the evidence.[12] According to the Third Circuit, in granting a new trial on this basis (278 F.2d at 90),

> the trial judge . . . has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

More recent cases have identified other reasons for the gradual erosion of the policy requiring extreme deference to trial judges' rulings on motions for new trials. For example, in *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982), the Fifth Circuit explained that the federal courts of appeals have been less deferential when reviewing orders *granting* motions for new trials than when reviewing orders *denying* such

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[12] In *Lind*, the court distinguished between new trials granted because the verdict was against the weight of the evidence and those granted when "something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible." 278 F.2d at 90.

motions.[13] In fact, the court stated that, in certain circumstances, the courts of appeals *independently review* the trial judge's decision.[14]

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[13] According to the Fifth Circuit, when the courts of appeals review orders *denying* motions for a new trial, all the relevant factors—deference to the trial judge who has had an opportunity to observe the witnesses and who is not limited to reviewing a cold record, deference to the jury's determination of the weight of the evidence, and the constitutional allocation to the jury of questions of fact—favor affirmance. It continued:

> When the trial judge sets aside a jury verdict and orders a new trial, however, our deference to him is in opposition to the deference due the jury. Consequently, in this circuit as in several others, we apply a broader review to orders granting new trials than to orders denying them.... And where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial.

Shows, 671 F.2d at 930.

[14] In a passage which indicates the distance the courts of appeals have travelled from Learned Hand's position in *Portman*, the court gave a candid assessment of the current appellate practice.

> On appeal, *we review the evidence closely* to ensure that this standard has been met. We have also considered three factors that militate against new trials and require a particularly searching review of the evidence: simplicity of the issues, the extent to which the evidence is in dispute, and the absence of any pernicious or undesirable occurrence at trial.... When all three factors are present ... there is little if any, need to defer to the judge as against the jury, and we will not affirm an order granting a new trial unless on review we are satisfied, *independently*, that the jury verdict was against the great weight of the evidence.... When one or more of these factors are absent, however,... [i]t is enough ... that, in view of possible considerations not apparent from the written record, we can perceive a sound basis for the trial judge's finding the verdict against the great weight of the evidence.

Shows, 671 F.2d at 930-31 (emphasis added)(citations omitted).

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The decision below, in which the First Circuit expressed its adherence to the modern trend, is a clear example of the ever-widening scope of appellate review of rulings on motions for new trials. This Court has expressed its "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this Court, . . ." *United States v. Mason*, 412 U.S. 391, 396. The time has come when this innovation by some of the lower federal courts should be reviewed here.

B. The decision below, which typifies the modern trend of according little or no deference to trial judges' rulings on new trial motions, presents an issue of importance to the administration of justice in the federal system.

This Court has recently emphasized the importance of maintaining the appropriate allocation of responsibilities between the district courts and the courts of appeals.[15] It is essential to the efficient functioning of the adjudicatory process that the proper balance be maintained. The usurpation of a task properly assigned to another level can (1) seriously disrupt the traditional balance, (2) confuse the essential natures of the appellate and trial courts, and (3) increase the volume of cases

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In the instant case, two of the factors which, under the Fifth Circuit's view, militate against applying the "particularly searching review" required by the "modern trend" were present. The issues in this lengthy medical malpractice case, involving numerous hospitalizations and extensive medical testimony, were *not* simple. Furthermore, questions received from the jury during its deliberations indicated that there may have been a "pernicious or undesirable occurrence," i.e., jury confusion evidenced by its apparent failure to understand even the relatively simple aggravation theory. Thus, the First Circuit's decision to apply an increased level of scrutiny, despite the presence of these two factors, represents a major departure from the "modern trend."

[15] *See, e.g., Pullman-Standard v. Swint*, 102 S. Ct. 1781 (involving appellate circumvention of the "clearly erroneous standard" of Fed. R. Civ. P. 52(a)).

proceeding to appellate levels of decision.[16] And, of more importance in the individual case, the arrogation of a function properly assigned elsewhere typically removes decision-making authority from the tribunal best qualified to make the judgment in question.

The decision below, which reflects the sentiment that close scrutiny of trial judges' rulings on motions for a new trial is necessary to prevent usurpation of the fact-finding role which the Seventh Amendment allocates to the jury, misapprehends the thrust of the Seventh Amendment. Indeed, it stands the Amendment on its head. The ever-widening scope of appellate review, which characterizes the "modern trend," only serves to disrupt the allocation of judicial responsibilities, which is an inherent part of the right to trial by jury.

Reliance on the Seventh Amendment to support an expanded scope of appellate review of new trial orders represents a fundamental departure from the traditional teaching that the exercise of the trial judge's *duty* to grant a new trial "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)(Parker, J.). Increased appellate interference with the trial judge's exercise of a power which has traditionally been regarded as an essential attribute of trial by jury represents a serious threat to the Seventh Amendment guarantee that "the right of trial by jury shall be preserved, . . ." U.S. Const. amend. VII.

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[16] Judge Nangle, of the Eastern District of Missouri, in a recent article, sounded "a genuine expression of alarm over the great imbalance that has developed between trial courts and appellate courts." Nangle, *The Ever-Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409, 410-11 (1981). Although his remarks were principally addressed to another example of an overly expansive exercise of appellate review, i.e., the circumvention of Fed. R. Civ. P. 52(a), the general concerns expressed are equally applicable in this context. Judge Nangle identified a number of undesirable consequences—the general disruption of the orderly administration of justice, impairment of the confidence of litigants and the public in the decisions of the district courts, proliferation of the number of appeals, a lowering in the morale of district court judges, a decreasing likelihood of settlements, and a decline in respect for the legal system.

The trial judge, when he determines that justice requires *reconsideration* by a second jury, does not *substitute* his view of the evidence. As Judges Hastie and Kalodner said, dissenting in *Lind*:

> This traditional conception of the role of the trial judge has provided the one important limitation on the power of the jury to make an unimpeachable decision on the facts even where the evidence is conflicting. The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what in his professionally trained and experienced judgment is an unjust verdict by vacating it and causing the matter to be tried again by a second jury. Thus, *the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other.*

Lind, 278 F.2d at 91 (emphasis added).

Properly understood, the appellate role, when reviewing the grant of a motion for a new trial, is simply to "see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." *Lind*, 278 F.2d at 91 (Hastie and Kalodner, JJ., dissenting). A more expansive appellate review does not protect against the usurpation of the *traditional* function of the jury. On the contrary, as the dissenters in *Lind* correctly stated, the expanded scope of review "imping[es] upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent." *Id.* at 92.

In addition to being grounded in historical experience, this limited scope of appellate review is based upon a realistic assessment of the relative competence of the trial judge and the court of appeals. The decision to grant a motion for a new trial is, by its very nature, highly discretionary. The trial judge, who, unlike the appellate court, is not constrained by having to review a cold record, is in a unique position to exercise the

professional *judgment* called for by a motion for a new trial based on the ground that the verdict was against the clear weight of the evidence.

Certainly, appellate review of a trial judge's ruling on a new trial motion should not involve a detailed weighing of the evidence or an assessment of credibility, as was done by the court below in this case. The district judge, who presides over the trial, hears the witnesses, and plays the closest and most vital judicial role in the fact-finding process, is in a far better position to determine whether justice requires that the case be reconsidered by a second jury. Appellate interference with the judgment of the trial judge should, if at all, be saved for the most exceptional circumstances. As Justice Brandeis admonished: "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485.

The abandonment of the traditional deference accorded to trial judges' decisions on new trial motions presents an issue of importance to the administration of justice in the federal system. As this Court recently noted, "[the grant of a motion for a new trial] is not an uncommon feature of any trial which goes to verdict." *Allied Chemical*, 449 U.S. at 36. Therefore, the "modern trend" toward an expanded scope of appellate review—typified by the decision below—represents a serious threat to several important principles.[17] Most importantly, the

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[17] In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930, Judge Mehaffy, who emphasized that a ruling on a motion for a new trial should not be reversed absent a *clear* or *patent* abuse of discretion, recited some of the adverse consequences he perceived would result from the expanded scope of appellate review: "There is no way to predict how much additional work will be created if the rule of this circuit in such matters is abrogated. If we must follow the panel's new rule, it will place this court in the role of trying cases de novo for which we are not and cannot be equipped. Furthermore, this new appellate capacity threatens to erode the factfinding responsibility of the district courts." *Id.* at 190 (Mehaffy, J., dissenting from the denial of rehearing en banc).

ever-widening scope of appellate review impinges upon the traditional role of the trial judge to exercise his discretion to grant a motion for a new trial. Moreover, increased appellate scrutiny removes decision-making authority from the tribunal uniquely situated to exercise this limited restraint on the jury. Finally, because the expanded scope of appellate review threatens an essential attribute of the right to trial by jury, the issue is of constitutional dimensions. This Court's attention and review are clearly warranted.

C. This Court should clarify the appropriate and constitutional standard of appellate review of new trial orders.

Although the "modern trend" pushes toward a more expansive appellate review of new trial orders, the courts of appeals have never defined, with any degree of precision, the appellate role in exercising this "closer degree of scrutiny and supervision." *Lind*, 278 F.2d at 90.[18] Indeed, the standard of review, when it is set forth, is formulated in a variety of ways. *Compare Coffran*, 683 F.2d at 6; App. A at 2a ("abuse of discretion") *with Harris v. Quinones*, 507 F.2d 533, 535 (10th Cir. 1974) ("gross abuse of discretion"). And, the formulations are not wholly verbal; they seem to indicate a court of appeals' willingness to overturn the judgment of the trial judge, in certain instances as an exercise of the court of appeals' independent judgment.

Perhaps most importantly, some courts of appeals seem to have confused the standard for reviewing a ruling on a motion for a new trial with the standard for reviewing a ruling on a motion for j.n.o.v.[19] For example, in *Lind*, the majority, in

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[18] In *Lind*, the dissenters stated: "the only function of a reviewing court, once the trial court has ordered a new trial, is to see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict. The majority do not challenge this view, though they do not state explicitly what their understanding of our role is." *Lind*, 278 F.2d at 91 (Hastie and Kalodner, JJ., dissenting).

[19] *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 (1973) (noting recurrent tendency of courts to confuse the standard for a new trial with that for a directed verdict or j.n.o.v.).

reversing the grant of a new trial motion, rebuked the trial judge for considering the credibility of the witnesses. But, as one commentator has noted, "to deny the trial judge the right to consider the credibility of witnesses in passing on motions for new trial is to confuse the standard to be applied by him when considering motions for directed verdict or judgment n.o.v. with the standard associated with motions for new trial." 1961 Duke L. J. 308, 314.[20] In the instant case, some of this confusion appears evident. The court made reference to the evidence being in conflict, *Coffran*, 683 F.2d at 7; App. A at 3a, and placed a great deal of emphasis on the district judge's rejection of what the court of appeals considered to be "credible expert testimony." 683 F.2d at 11; App. A at 11a.

The apparent confusion about the appropriate standard seems to be a product of the "modern trend" toward a more expansive scope of appellate review. Although the trial judge is not to act as a "13th juror," *Coffran*, 683 F.2d at 6; App. A at 2a, he is permitted to weigh the evidence, and a motion for a new trial can be granted "even though there may be substantial evidence which would prevent the direction of a verdict." *Aetna Casualty*, 122 F.2d at 352-53. The confusion which exists can only serve to undermine an essential function of the trial judge under the Seventh Amendment, i.e., his duty to exercise his discretion to grant a new trial motion when—in the exercise of his professional and judicial judgment—he believes that justice requires that a case be reconsidered by a second jury.

This Court's consideration is necessary in order to clarify the confusion which exists in the lower courts as to the appropriate standard of appellate review of new trial orders. Without this Court's attention, the role of the district judge—in acting as an "historic safeguard" of the right to trial by jury—will not be preserved.

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[20] Some courts of appeals, in reviewing rulings on motions for new trial, have relied on cases which involved review of decisions on motions for j.n.o.v. *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978); *see Fireman's Fund*, 466 F.2d at 186. In *Fireman's Fund*, the dissent called attention to the panel's error in relying on j.n.o.v. cases in formulating standards for appellate review of new trial orders. *Fireman's Fund*, 466 F.2d at 189 (Mehaffy, J., dissenting from denial of rehearing en banc).

CONCLUSION

This Court's review of the decision below is necessary to prevent the undue expansion of appellate review of new trial orders and to clarify the appropriate standard of review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898
Counsel for the Petitioner

Of Counsel
STANLEY M. BROWN
DAVID L. NIXON
LESLIE C. NIXON
BROWN AND NIXON
Eighty Merrimack Street
Manchester, New Hampshire 03101
(603) 669-8080

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